84-1407

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. _____

BONITA V. SCOTT,

Petitioner,

v.

MALCOLM BALDRIGE, SECRETARY, UNITED STATES DEPARTMENT OF COMMERCE

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether it is reversible error for a court to assume the existence of a prima facie case of discrimination, without factual findings concerning the McDonnell Douglas factors, when such an assumption has the effect of depriving a Title VII plaintiff of the benefit of a mandatory presumption of discrimination?

2. Whether a Title VII defendant may meet its burden of production through the admission of surprise evidence which was not produced for plaintiff review and inspection when requested during discovery nor disclosed during pretrial or whether the sufficiency of defendant's evidence offered to rebut a plaintiff's prima facie case is required to be evaluated by the extent to which it provides a Title VII plaintiff with a full and fair opportunity to demonstrate pretext?

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1. It Is Reversible Error For A District Court To Assume the existence of a prima facie case of discrimination without factual findings concerning the McDonnell Douglas factors when such an assumption has the effect of depriving a Title VII plaintiff of the benefit of a mandatory presumption of discrimination.

2. A Title VII defendant may not meet its burden of production through the admission of surprise evidence which was not produced when requested during discovery nor disclosed during pretrial when its admission has the effect of denying a Title VII plaintiff a full and fair opportunity to demonstrate pretext.

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In The

SUPREME COURT OF THE UNITED STATES

September Term, 1980

No. _____

BONITA V. SCOTT,

Petitioner,

v.

MALCOLM BALDRIGE, SECRETARY, UNITED STATES DEPARTMENT OF COMMERCE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Bonita V. Scott, respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the District of Columbia

Circuit entered on November 2, 1984.

DECISIONS BELOW

The decision of the Court of Appeals is not reported. The decision along with the Order overruling Petitioner's Petition For Rehearing and the decision and Judgment of the District Court are attached as Appendices hereto.

JURISDICTION

The decision of the Court of Appeals was entered on November 2, 1984. A timely petition for rehearing with suggestion that the rehearing be in banc was denied on December 6, 1984. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTE AND RULE INVOLVED

The statute involved is 42 U.S.C. § 2000e, et seq., as interpreted in Texas Department of Community Affairs v. Burdine, infra. Rule 52(a) Fed. R.

Civ. P., which requires the District Court to make findings of fact, is also involved.

STATEMENT OF THE CASE

Petitioner, a black female employee of the United States Department of Commerce, Minority Business Development Agency (MBDA), has been employed with the Federal Government for over 28 years. Petitioner served in a GS-301-9 position with the Capital Development Division of MBDA. Although Petitioner's job was formally ranked at the GS-301-9 level, she actually performed the same duties in the Capital Development Division as a male employee, Lonnie Murray, whose job was formally ranked at the GS-1101-13 grade level. (Tr. 62, 266-267).

In February 1980, Philibert Labonte, a white male, became the supervisor of Petitioner and Murray as the Acting Chief of the Capital Development Division.

(Tr. 59). During this time, the Capital Development Division had a heavy workload of projects and was understaffed. A staff of three persons were performing the duties required of eight to nine persons. (Tr. 338-339). Petitioner and Murray performed all of the professional work in the Division and divided the workload between themselves. Based on the exemplary level of Petitioner's performance and the accretion of her duties, Murray recommended to LaBonte that she be promoted from the GS-301-9 level to the GS-1101-11 grade level. (Tr. 208). Petitioner's position was incorrectly classified in the 301 series and management withheld the information which was requested by the personnel office to reclassify it. (Tr. 439-441). LaBonte also took no action to promote Petitioner. Consistent with his actions against Petitioner, LaBonte demonstrated a pattern of

discriminating against his other black employees. (Tr. Tr. 101, 282-285, 292-299, 310-311). He made a racial slur in in the context of minority business enterprise that "blacks should be happy playing basketball and singing." (Tr.218). He intentionally downgraded Petitioner's performance in 1980 and admittedly violated federal law when he misrepresented that he had discussed it with her before submitting it into her personnel records. (Tr. 82-87). (Finding #12). It was clearly established during trial that LaBonte had more contact with his white employees because he was more at ease with white employees. (Finding #11). Thus, he would communicate with black employees through a white intermediary (Tr. 325).

When Murray went to LaBonte's supervisor to get Petitioner promoted, LaBonte interfered with his supervisor's

efforts to promote her by singling her out for a desk audit. (Tr. 380-381). After a desk audit in 1981, Petitioner was never informed of its results. (Tr. 114-115) After suit was filed Petitioner again requested the results of her desk audit during discovery but was informed by Respondent that the documentation concerning her desk audit had been lost. Respondent did not disclosed the desk audit documentation during pretrial. It was only after this action was in trial did Respondent spring the numerous desk audit documentation upon Petitioner. (Tr. 114-115). Although Petitioner objected to the admission of these documents on the basis of surprise, such documents were admitted into evidence over Petitioner's objection as Respondent's explanation of a legitimate, nondiscriminatory reason for its decision.

(Tr. 452). Respondent, however, offered no evidence to rebut Petitioner's preponderance of evidence concerning discriminatory behavior by LaBonte toward Petitioner and other black employees. Following a trial to the Court, the District Court assumed the existence of a prima facie case and ruled on January 13, 1984, based on the surprise evidence, that racial animus was not involved in Petitioner's failure to be promoted. Petitioner was foreclosed by the District Court from presenting comparative evidence of sex discrimination during trial, yet the District Court found that there was "no evidence of sex discrimination in the record." (Tr. 381). (District Court Finding #14).

The Court of Appeals for the District of Columbia Circuit in its memorandum decision of November 4, 1984,

likewise assumed the existence of a prima facie case and affirmed the District Court's ruling that there had been no discrimination in Petitioner's failure to be promoted and upheld the admission of the surprise documents.

Petitioner then filed a petition for rehearing (with the suggestion that the rehearing be en banc) in the Court of Appeals; the petition was overruled on December 6, 1984.

Petitioner now files this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

Petitioner submitted numerous documents and witnesses which clearly demonstrated that she was actually performing at the GS-11 grade level. The District Court and the Court of Appeals, however, made no findings of fact concerning the

establishment of a prima facie case of discrimination by Petitioner. Instead, both courts assumed, without factual findings, the existence of a prima facie case, and hastily proceeded to plaintiff's overall burden of proving discrimination. Petitioner never had a fair opportunity to demonstrate pretext. Thus, such an assumption by both courts had the effect of depriving Petitioner of the mandatory, presumption of discrimination which inures to the benefit of a Title VII plaintiff who factually establishes the elements of a prima facie case. The lower federal courts decisions in this case conflict with the standards governing the establishment of a prima facie case, developed by this Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 248,252-56 (1981).

In the instant case, Petitioner established a prima facie case by demon-

strating [1] that as a Black female she was a member of a protected group, [2] that she was qualified for and was recommended for an accretion of duties promotion from GS-9 to GS-11, [3] that she was denied the promotion to GS-11 by her supervisor (white male) who was aware that she was working beyond the GS-9 grade level, who had made racial slurs, who violated federal law in his downgrading and completion of Petitioner's annual performance evaluation, who had little contact with his Black employees because he was more at ease with white employees, who would only deal with his black employees through one of his white employees, and who demonstrated a pattern of discriminating against black females, and [4] that a white female employee under the white male's supervision was promoted at the time that Petitioner was

denied her promotion.

Here, Petitioner proved that she had established the existence of a prima facie case by a preponderance of the evidence and maintains that it was clearly erroneous for the District Court to assume, without making factual findings, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, that a prima facie case in fact had been established.

Moreover, the District Court and the Court of Appeals erred by not considering Petitioner's prima facie case in the McDonnell Douglas/Burdine context. The Court of Appeals concluded that applying the McDonnell Douglas/Burdine standards defining a prima facie case to Petitioner's factual matrix was too difficult because it was a "somewhat atypical failure to promote claim...." (Scott v. Baldridge, No. 845062, p.1,

n.1). Thus the erroneous assumption of a prima facie case caused the District Court and the Court of Appeals to hastily proceed to Petitioner's overall burden of proving discrimination without evaluating the sufficiency of the Respondent's evidence by the extent to which it fulfilled the dual functions for placing a burden of production on the defendant in the first place; namely, "(1) to meet the plaintiff's prima facie case by presenting a legitimate reason for its action and (2) to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." Burdine at 255-256.

The District Court and the Court of Appeals misapprehended the necessity in a Title VII case for the progressive allocation of burdens and the creation of a presumption by the factual estab-

lishment of a prima facie case. This necessity was explained by this Court in Burdine, supra. as "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination". 450 U.S. at 250 n. 8. However, in the instant case, the factual inquiry never progressively proceeded to this new level of specificity due to the erroneous assumption of a prima facie case. In other words, the "elusive factual question of intentional discrimination" eluded both courts. Respondent thus offered no evidence to rebut Petitioner's mandatory inference of discrimination because the courts skipped the progressive allocation of burdens as required by the McDonnell Douglas/Burdine framework. As a result, Petitioner never had an opportunity to effectively demonstrate that Respondent's proferred reasons (surprise documents)

for Petitioner's nonpromotion were not the true reason for its decision.

The haste assumption of a prima facie case can be a two-edged sword which is unfair to both plaintiff and defendant in a Title VII case. On the one hand, assuming the existence of a prima facie case is unfair to a Title VII defendant, when a prima facie case does not exist, because it would be unduly burdensome and costly for the case to proceed any further since no burden shifts to the defendant to produce any evidence. On the other hand, it is unfair to a Title VII plaintiff for a court to assume the existence of a prima facie case, when it has the effect of depriving such plaintiff of the benefit of a mandatory, rebuttable presumption. This is especially unfair where there is a preponderance of evidence to find that a prima facie case has been established; but the court's

assumption causes it to proceed to plaintiff's ultimate burden before properly evaluating defendant's evidence to determine if it meets plaintiff's prima facie case and to determine if it clearly frame the factual issue so plaintiff will have a full and fair opportunity to demonstrate pretext. Due to this dual unfairness, assuming the existence of a prima facie case is not an expedious and fair method for the litigants and the court to reach the ultimate question of intentional discrimination. Especially, when adherence to the McDonnell Douglas/Burdine "division of intermediate evidentiary burdens serves to bring the litigants and the court expediously and fairly to this ultimate question". Burdine at 253.

Within the context of the McDonnell Douglas/Burdine framework, the burden of establishing a prima facie case is not

onerous. Burdine at 253. Yet, outside that framework, as was the case for Petitioner below, proving plaintiff's overall burden of showing intentional discrimination is impossible without a full and fair opportunity to show pretext. Thus, this Court should not permit a District Court to assume the existence of a prima facie case where it has the effect of depriving a plaintiff of an inference of discrimination which the establishment of a prima facie case justifies. Cf., United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 716 (1983); Cooper v. Federal Reserve Bank, 104 S. Ct. 2794, 2799 (1984).

II

As a result of the Court of Appeals and the District Court decisions, it appears that surprise tactics and maneuvering are permissible to meet a Title VII defendant's burden of production in

an employment discrimination case. There is an active conflict with both courts' rulings below and the clear spirit of the Federal Rules to eliminate surprise and outlaw the old sporting theory of justice from the Federal Courts. Cf, Burton v. Weyerheauser Timber Co., 1 F.R.D. 571, 573 (1941); see also, Holtzoff, Elimination of Surprise in Federal Practice, 7 Vand. 576 (1954). In the light of the widely accepted objective of the Federal Rules of Civil Procedure to eliminate surprise as a trial tactic, one can hardly imagine a greater breach of the spirit of the Rules than to deny to a victim of discrimination the full and fair opportunity to show pretext. Simple justice requires a clear explanation for defendant's action, and, that all the admissible evidence be identified and disclosed for adequate preparation before trial.

The procedure followed by the courts below is in essence a negation of the evidentiary relationship between the presumption created by a prima facie case and the consequential burden of production placed on a Title VII defendant and, therefore, conflicts with this Court's holding in Burdine, supra. Realistically, the only way a plaintiff could prove pretext would be for a defendant's explanation of the legitimate reasons for its decision to be clear, explicit and reasonably specific before trial so that a plaintiff can have a full and fair opportunity to demonstrate pretext at trial. This is precisely what this Court held in Burdine, supra, when it concluded that a Title VII defendant "must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff rejection." 450 U.S. at 255. This standard does not contemplate sur-

prise as admissible evidence. Surprise is so repugnant to our tradition of fair play and the imperative of judicial integrity that the countenance of its use in the context of this case should be immediately corrected.

By necessary implication, the standard requiring plaintiff to have a "full and fair opportunity to demonstrate pretext" should require the per se exclusion by the District Court of surprise evidence which was requested during discovery but not produced by defendant until the case was in trial. Surely fundamental fairness requires no less. The exclusion of evidence has long been a judicial feature of protecting important constitutional rights and maintaining the imperative of judicial integrity from the misconduct of governmental officials. See, Weeks v. United States, 232 U.S. 383 (1914) and Mapp v.

Ohio, 363 U.S. 643 (1961).

Petitioner's due process rights to notice and to be heard, as implied in the "full and fair opportunity" standard enunciated in Burdine, supra, were infringed by the admission of surprise evidence as an explanation of Respondent's employment decision. In Burdine, supra, this Court held that an "articulation not admitted into evidence will not suffice." 450 U.S. at 255 n. 9. Accordingly, this Court should not permit a defendant to meet its burden through the use of surprise evidence which was withheld when requested during discovery. A defendant who has engaged in misconduct is not entitled "to the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent."

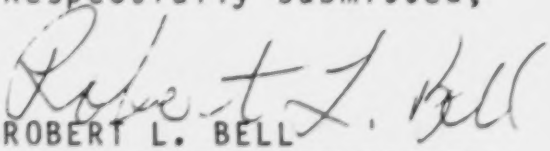
Minneapolis, St. Paul & S. S. Marie Ry;

Co. v. Moquin, 283 U.S. 520, 521-522 (1931). This would be a proper case in which to make clear that surprise has no place in the trial of a Title VII case.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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Dated: March 5, 1985

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Petition for Writ of Certiorori were mailed by first class mail, postage prepaid, to Robert E. L. Eaton, Jr., Assistant United States Attorney, Room 2826, U.S. Courthouse, 3rd & Constitution Avenue, N.W., Washington, D.C. 20001 on this 5th day of March, 1985.

Robert L. Bell

Robert L. Bell

Attorney for Petitioner

APPENDICES "A" through "C"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BONITA V. SCOTT,	:	
Plaintiff,	:	Civil Action 81-2385
-againts-	:	FILED
	:	Jan. 13, 1984
MALCOLM BALDRIDGE, SECRETARY OF COMMERCE,	:	
Defendant.	:	

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

1. Plaintiff, Bonita V. Scott, is a Black female who is currently employed in the Minority Business Development Agency (MBDA), United States Department of Commerce. She is a GS-9 Program Specialist in the Capital Development Division, Office of the Deputy Associate Director for Market Development. She has held that position since 1978. She had previously served

in the Capital Development Division in an unestablished position. Between April 1973 and June 1978 Scott worked in the Legal Staff and then in the Office of Chief Counsel. Her promotion to her current GS-9 grade was in 1974.

2. In this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., the Defendant, Malcolm Baldridge, is sued as the Secretary of the United States Department of Commerce. Plaintiff alleges that she was denied a promotion to grade GS-11 because of race and sex discrimination.

3. Scott worked under the supervision of James Marx, Chief of the Capital Development Division between July 1978 and February 1980. The position of Chief of the Capital Development Division was not filled after Mr. Marx vacated it in February 1980 until Lloyd

Arrington assumed the position of Chief of the Capital Development Division in the summer of 1981.

4. As a result of a reorganization within the Minority Business Development Agency, Philibert LaBonte became Deputy Associate Director for Market Development, a GS-15 position. He had four divisions under his supervision; the Industry and Trade Division, the Government Resources Division, the Capital Development Division and the Management Development Division. The position of Chief for each of these Divisions was vacant except for the Management Development Division in which Al Roma served as Chief.

5. Personnel in the Capital Development Division in 1980 included Lonnie Murray, Project Officer, GS-13; Plaintiff Scott; Diane Bush, Clerk-Stenographer, GS-4; and for a few

months beginning in October, Edith Pack, Secretary, GS-7. Murray and Bush are Black employees; Pack is white.

6. LaBonte was supervised by the Associate Director, Policy and Management, Martha Mitchell. Mitchell was followed in the position of Associate Director by Clifford O. Young and then by Allen A. Stevenson. All are Black.

7. Under the direction of Martha Mitchell, LaBonte served as Acting Chief for the Capital Development Division, the Industry and Trade Development Division and the Governmental Resources Development Division during vacancies in those positions. Until Arrington assumed the position of Chief of the Capital Development Division in the summer of 1981, LaBonte was the Administrative Supervisor for employees in that Division including Plaintiff Scott.

8. During the period in which LaBonte was Acting Chief of the Capital Development Division, he did not recommend any employee for promotion.

9. The Capital Development Division had a heavy workload of projects in 1980 and was understaffed. Scott and Murray performed all of the professional work in the Division and divided the workload between themselves. They did what was necessary to get a particular project or work assignment done properly. Between themselves they dealt with all aspects of grant administration within the Division. They had a pleasant and harmonious working relationship. This relationship and their joint skills and experience allowed them to produce the quantity and quality of work that satisfied LaBonte. Scott's abilities were readily accepted by Murray and LaBonte. Murray's assessment of Scott's perform-

ance is indicated by the performance evaluation he made of her at LaBonte's instruction. Murray also submitted a recommendation through LaBonte that Scott be promoted to the GS-1101-11 grade level based on an accretion of her duties and the high-quality of her performance. No action was taken on his recommendation.

10. Murray who had made recommendations concerning Scott's performance appraisal had never read her position description and was not familiar with the duties and responsibilities that were assigned to her by that position description. LaBonte's familiarity with Scott's work was derived from the correspondence and written work products concerning the Capital Development Division which went through his office. He reviewed those documents and the authors as indicated in them. This was the basis for his assessment of Scott.

11. LaBonte had little personal contact with his Black employees. He had more personal contact with his white employees with whom he acted more at ease. This was perceived by the Black employees as treating them "differently." But this difference in treatment did not result in more favorable treatment of whites, nor conversely, less favorable treatment of Blacks. No whites were promoted by him. He reassigned Diane Bush, a Black, from a temporary position to a full time position. He had recommended Carolyn Pleasant, a Black, for a sustained superior performance award. He softened Mitchell's downgrade of Scott's performance evaluation.

12. LaBonte's failure to discuss with his employees the appropriate section of their performance evaluations in 1981 before submitting them to Person-

nel, although admittedly in violation of regulations does not give rise to an inference that a racial motive was involved. The performance evaluations of all employees were submitted tardily in the same fashion.

13. Scott's position was not in a career ladder. The only means for a noncompetitive promotion for a position outside a career ladder is through an accretion of duties. The decision to add duties to a position is discretionary with management. In 1981, at LaBonte's request, the Office of Personnel Operations conducted an audit of Scott's position to determine whether it was properly classified. The audit was performed and an analysis of the job audit concluded that the position was properly classified at the GS-9 grade level. LaBonte did not add duties to Scott's position nor did the Black supervisors

who succeeded him. No racial animus was involved in Scott's failure to be promoted.

14. There is no evidence of sex discrimination in this record.

CONCLUSIONS OF LAW

1. All of the jurisdictional prerequisites for the filing of this action have been satisfied. The Court has jurisdiction pursuant to 42 U.S.C. § 2000e-16 and the proceeding in this Court is de novo. Chandler v. Roudebush, 425 U.S. 840 (1976).

2. In cases of alleged unlawful disparate treatment under Title VII, courts employ a three-stage order of proof derived from McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). The plaintiff has the initial burden of

establishing a prima facie case of race or sex discrimination. If plaintiff meets this burden, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the negative employment action suffered by plaintiff. If defendant articulates a legitimate, non-discriminatory reason, the burden returns to plaintiff to demonstrate that the reason offered by defendant is not the real reason but is a pretext for discrimination. Plaintiff has the ultimate burden of proving discrimination by a preponderance of the evidence.

3. The elements of a prima facie case of employment discrimination, whether it be race or sex, are not confined to an inflexible formula, but necessarily vary from case-to-case, depending upon the underlying factual situation. McDonnell Douglas, 411 U.S.

at 802 n.13. In the context of an alleged discriminatory refusal to promote, the United States Court of Appeals for the District of Columbia Circuit has suggested that a Title VII plaintiff may establish a prima facie case by showing that: (1) she belongs to a protected group; (2) she was qualified for and applied for a promotion; (3) she was considered for and denied the promotion; and (4) other employees of similar qualifications who were not members of the protected group were indeed promoted at the time plaintiff's request for promotion was denied. Freeman v. Lewis, 675 F.2d 398,400 (D.C. Cir. 1982).

4. Plaintiff Scott claims that officials at the Department of Commerce refused to promote her to a GS-11 level on account of her race and sex. Even assuming that Plaintiff made out a

prima facie case of unlawful discrimination, the Court concludes that Defendant possessed and articulated sufficiently legitimate non-discriminatory reasons why Plaintiff was not promoted or recommended for promotion in 1980 or 1981. Because Plaintiff's position is not in a career ladder, the only means for a non-competitive promotion is through an accretion of duties. LaBonte, after examining Plaintiff's work performance, determined that adtional duties should not be added to her position in order to increase the grade level. He based this determination on an examination of the documents she prepared. Similarly, Plaintiff's Black supervisors who succeeded LaBonte did not add duties to her position to enable her to increase her grade level. Finally, LaBonte's failure to discuss Plaintiff's performance appraisals with

her prior to its submission to the personnel office did not adversely affect her promotion rights in that the only specific matter which LaBonte was obligated to discuss with her was the fact that she was rated satisfactory and in that the appraisal was available to Plaintiff and could have been amended, if appropriate, after its submission.

5. At this stage of the analysis, according to the Court in Burdine:

> [i]f the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity . . . The plaintiff retains the burden of persuasion. [The plaintiff] now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the

Court that she has been the victim of intentional discrimination.

Burdine, 450 U.S. at 255-56. Based on the foregoing findings, the Court concludes that the Plaintiff failed to demonstrate by a preponderance of the evidence that those reasons proffered by the Defendant were not in fact the true reasons for the personnel decisions in question. Accordingly, the Court finds that judgment must, therefore, be entered for the Defendant and this case is dismissed.

An appropriate Order accompanies these Findings of Fact and Conclusions of Law.

/s/
Aubrey E. Robinson, Jr.
Chief Judge

DATE: January 12, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BONITA V. SCOTT,	:	
Plaintiff,	:	Civil Action 81-2385
-againts-	:	FILED Jan. 13, 1984
MALCOLM BALDRIDGE, SECRETARY OF COMMERCE,	:	
Defendant.	:	

ORDER

In accordance with the Findings of Fact and Conclusions of Law entered this date in the above-captioned action, it is by the Court this 12th day of January, 1984,

ORDERED, that judgment be and hereby is entered in favor of Defendant and against Plaintiff on all claims raised in this action; and it is

FURTHER ORDERED, that the above-captioned action be and hereby is dismissed.

/s/
Aubrey E. Robinson, Jr.
Chief Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5062 September Term, 1984
Civil Action No.
02385

Lisa V. Weathers

Bonita V. Scott,
Appellant

United States Court of Appeals
for the District of Columbia
Circuit

v. Filed Nov -2 1984

GEORGE A. FISHER
CLERK

Malcolm Baldrige, individually
and as Secretary of Commerce,
and his agents, assigns, and
successors in office

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

Before: WILKEY, WALD, and SCALIA,
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been

accorded full consideration by the Court. See Local Rule 13(c). On consideration thereof and for the reasons set forth in the accompanying memorandum, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed. It is

FURTHER ORDERED, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
For The Court

/s/

George A. Fisher
Clerk

Scott v. Baldrige, No. 84-5062

MEMORANDUM

Bonita V. Scott appeals from a judgment dismissing her race and sex discrimination action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, against her employer, the Secretary of Commerce. After trial to the bench, the district court determined that even assuming Scott successfully established a prima facie case of unlawful discrimination, she did not show that the Secretary's legitimate, nondiscriminatory explanation for the Commerce Department's failure to promote Scott was not the true reason for that decision. Scott v. Baldrige, Civ. No. 81-2385, slip op. at 7-9 (D.D.C. Jan. 13,

1984).[1] Scott attacks this crucial factual finding as clearly erroneous. She also contends that the district court erroneously admitted an important defense

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[1]The Supreme Court developed the general legal standards governing a prima facie case under Title VII in Cooper v. Federal Reserve Bank, 104 S. Ct. 2794, 2799 (1984); United States Postal Serv. Bd. of Governors v. Aikens, 103 S. Ct. 1478, 1481-82 (1983); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-05 (1973). This court applied those cases to allegations of a discriminatory refusal to promote in Freeman v. Lewis, 675 F.2d 398, 400 (D.C. Cir. 1982), and Bundy v. Jackson, 641 F.2d 934, 951 (D.C. Cir. 1981).

This case presents a somewhat atypical failure to promote claim: in effect, Scott argues that she had already been promoted in fact because she performed duties properly classified at the GS-11 grade, and her employer discriminated against her by refusing to adjust her formal rank accordingly. The application of Title VII standards defining a prima facie case to this situation presents difficult issues, but we need not face those issues in this case. It is settled law that the overall burden of proving discrimination remains

exhibit at trial, even though the Secretary asserted that the exhibit could not be found during discovery and failed to include it in his pre-trial lists of exhibits. The Secretary explains that a government witness located the exhibit only on the eve of trial, and that the exhibit simply corroborated factual allegations of which Scott had long been aware. We affirm the judgment of the district court.

Footnote Continued
with the employee at all stages of a Title VII litigation. See, e.g., Cooper, 104 S. Ct. at 2799; Aikens, 103 S. Ct. at 1482. "[W]hen the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the fact finder must then decide whether the rejection was discriminatory within the meaning of Title VII." Aikens, 103 S. Ct. at 1482. It is the district court's finding on that dispositive issue we review today.

Scott is a black female employee of the Minority Business Development Agency (MBDA), which operates within the Department of Commerce. Since 1978, Scott has served in a GS-9 ranked position in the Capital Development Division of that agency. From February of 1980 to the summer of 1981, Scott was supervised by the Deputy Associate Director for Market Development and Acting Chief of the Capital Development Division ("Acting Chief"), a white male. Scott's central claim is that the Acting Chief discriminated against her by failing to acknowledge that although her job was formally ranked at the GS-9 level, she was actually performing duties properly ranked at the higher GS-11 level. After a careful review of the evidence, we cannot say that the district court's findings of fact were clearly erroneous, and we therefore uphold them. See

United States Postal Serv. Bd. of Governors v. Aikens, 103 S. Ct. 1478, 1482 (1983); Pullman-Standard v. Swint, 456 U.S. 273, 285-88 (1982).

Scott also complains that the district court eroneously admitted into evidence Defendant's Exhibit J, the handwritten notes of a government personnel officer assigned to investigate the classification of Scott's job. The officer performed that investigation of Scott's job. The officer performed that investigation, called a desk audit, in August of 1981. The notes state his conclusions that Scott was performing at the GS-9 level, and that her job was properly classified in the 301 series. He submitted those recommendations to his superior, Glenda Whiting. Whiting knew that the Office of Personnel Management, after conducting personnel management surveys concerning jobs in MBDA,

had decided that the 301 series jobs in the agency should be reclassified in the 1100 grouping. See Whiting Tr., R. 52G at 443-45. Based on the information gathered by her subordinate and the general recommendation from the Office of Personnel Management, Whiting wrote a memorandum on August 24, 1981, to Allan Stephenson, Associate Director for Policy and Market Development of MBDA and the direct supervisor of the Capital Development Division chief. Defendant's Exhibit I. She reported that Scott was performing duties properly classified at the GS-9 level, but that her job should be placed in a career ladder series with promotion potential to GS-12. Id. So long as Scott's job remained in the 301 series, she could be promoted only for accretion of duties. Whiting Tr., R. 52G at 444. Whiting asked Stephenson to draft a new position description for

Scott and return it to her with a formal request for reclassification of Scott's job in the new series. Defendant's Exhibit 1. Apparently the position description and request were never provided, and consequently the job remained in the wrong series. See Whiting Tr., R. 52G at 441.

At his deposition, the Acting Chief was asked about the desk audit. He testified that

> [T]he classification people of the Department of Commerce did a desk audit and concluded that [Scott's] position was, in fact, worthy of a GS-9. . . .[T]hat it could not hold as higher grade level for the duties and responsibilities which Miss Scott identified to the classification staff . . . . They recommended that she be placed in a series that would allow for upward mobility . . . . I can only assume from their recommendation that she be placed in a more general series that it was not possible in the position she was in. This occurred after I was no longer respons-

> ible for that division so I refer to it as an event that occurred following it and I had no control over what was done or not done with respect to that position at that time.

Dep., R. 52B at 52-54.

The Secretary could not find the notes that were later introduced as Exhibit J when they were requested during discovery, see Answer to Plaintiff's Second Set of Interrogatories pt. 2 ¶ 21.a, and he did not mention them in his pretrial list of exhibits, see Attachment to Defendant's Trial Brief. He explains that Whiting discovered the notes in her file just before trial, and that opposing counsel were promptly notified of their discovery. However, as the Acting Chief's deposition testimony shows, Scott knew the result of the desk audit long before trial. The district court replied to Scott's objection that she had been surprised by commenting

that the exhibit "confirms the testimony that [the Acting Chief] gave, and you certainly took his deposition." Tr., R. 52G at 452. The notes have no substantial bearing on the dispute over the proper series for Scott's job;[2] they

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[2] In any event, the exact relevance of the series classification dispute to Scott's case is unclear. She has consistently claimed that the Acting Chief, a white male, discriminated against her. See, e.g., Brief of Appellant 5-15, 31-35. In the summer of 1981, he ceased to be Scott's administrative supervisor. Scott v. Baldridge, Civ. No. 84-5062, slip op. at 3 (D.D.C. Jan. 13, 1984). Whiting did not request further information from Stephenson about Scott's position until August 24, 1981, see Defendant's Exhibit 1, and the Acting Chief testified at his deposition that he was not responsible for Scott at the time MBDA received Whiting's request, see Dep., R. 52B at 53-54. Thus, the alleged discriminator was evidently out of the picture when MBDA received Whiting's request, and he cannot be blamed for its failure to respond. Nor can he be blamed for the series misclassification that existed previously; the record reveals no reason why MBDA should have known any earlier that the 301 series was no longer appropriate for Scott's job.

merely corroborate the Secretary's evidence that Scott was performing at the GS-9 level.

Whatever the legal basis for Scott's complaint that she was unfairly surprised by admission of the exhibit,[3] it is abundantly clear that no per se rule of law required exclusion of the exhibit because of the Secretary's inadvertent

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[3]We assume for purposes of our decision that Scott adequately raised this objection before the district court. See Tr., R. 52G at 452.

Fed. R. Evid. 403 permits the exclusion of evidence if its probative value is substantially outweighed by the danger of unfair prejudice. The advisory committee note to the rule expresses doubt about whether unfair surprise could justify exclusion of evidence in light of discovery mechanisms, see Fed. R. Evid. 403 advisory committee note, but where, as here, discovery has been unavailing through no fault of the surprised party, a different result might be appropriate. Cf. 11 Wright & Miller, Federal Practice and Procedure § 2805 at 38 (1973 & Supp. 1984) (under Fed. R. Civ. P. 52(a), motion for new trial may be granted

failure to produce it during discovery; at most, the district court had the discretion to exclude it if admission would have been unfairly prejudicial to Scott. Scott has not convinced us there was any such prejudice. The exhibit simply supported specific factual allegations of which Scott was already aware. The exhibit also revealed the reasoning

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Footnote Continued
on grounds of unfair surprise). Under Fed. R. Civ. P. 16, a pretrial order "when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." The district court may also have inherent powers in light of Fed. R. Civ. P. 37, which regulates discovery, to refuse to admit evidence called for but not produced in discovery.

However, this case does not require us to determine the precise scope of the district court's power to exclude such evidence under these or any other sources of law, since we find that the court acted within its discretion in refusing to exercise its authority.

behind the classification decision, but Scott has not argued that this reasoning was unavailable through discovery. Scott did not seek a continuance to meet the new evidence, and it is unclear what good one would have done her. Her whole case had to be geared to meet the Secretary's claim that she was performing at the GS-9 level, and even before she knew of the exhibit she certainly had every incentive to find and present as much evidence as she could muster on that key issue. Cf. Fed. R. Civ. P. 61 (evidentiary error is not ground for new trial unless refusal to grant new trial is "inconsistent with substantial justice"). Under all these circumstances, we are not prepared to hold that the district court abused its discretion in admitting Exhibit J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5062 September Term, 1984

Lisa V. Weathers Civil Action No. 81-02385

Bonita V. Scott,
Appellant

v.

Malcolm Baldrige, et al.

BEFORE: Wilkey, Wald and Scalia,
Circuit Judges

O R D E R

On consideration of the Petition for Rehearing of Petitioners it is

ORDERED by the Court that the aforesaid Petition for Rehearing is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, Clerk

BY: /s/
Robert A. Bonner
Chief Deputy Clerk

FILED DEC 6, 1984